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A FEUDAL PRINCIPLE IN MODERN LAW.[1]

ROSCOE POUND.

PERHAPS no institution of the modern world shows such vitality and tenacity as our Anglo-American legal tradition which we call the common law. Although it is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules, it succeeds everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or to supersede them. In the United States, it survives the huge mass of legislation that is annually placed upon our statute books and gives to it form and consistency. Nor is it less effective in competition with law of foreign origin. Louisiana alone of the states carved from the Louisiana purchase preserves the French law. In Texas only a few anomalies in procedure serve to remind us that another system once prevailed in that domain. Only historians know that the custom of Paris once governed in Michigan and Wisconsin. And in Louisiana, not only is the criminal law wholly English, but the fundamental common-law doctrines, supremacy of law, case-law, and contentious procedure have imposed

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themselves on a French code and have made great portions of the law Anglo-American in all but name. There are many signs that the common law is imposing itself gradually in like manner upon the French law in Quebec. In everything but terminology it has all but overcome a received Roman law in Scotland. The established Roman-Dutch law in South Africa is slowly giving way before it as the judges more and more reason in a Romanized terminology after the manner of common-law lawyers. In the Philippines and in Porto Rico there are many signs that common-law administration of a Roman code will result in a system Anglo-American in substance if Roman-Spanish in its terms.

Whether it is the innate excellence of our legal system or the innate cocksureness of the people that live under it, so that even as Mr. Podsnap talked to the Frenchman as if he were a deaf child, we assume that our common-law notions are part of the legal order of nature and are innocently unable to understand that any reasonable being can harbor legal conceptions that run counter to them, the Anglo-Saxon refuses to be ruled by any other law. Even more, he succeeds in ruling others thereby. For the strength of the common law is in its treatment of concrete controversies, as the strength of its rival, the modern Roman law, is in its logical development of abstract conceptions. Hence, wherever the administration of justice is mediately or immediately in the hands of common-law judges, their habit of applying to the cause in hand the judicial experience of the past rather than attempting to fit the cause into its exact logical pigeonhole in an abstract system, gradually undermines the competing body of law and makes for a slow but persistent invasion of the common law.

At but one point has our Anglo-American legal tradition met with defeat in its competition with the rival tradition. The contest of French law, English law, and German law, in the framing of the new codes for Japan, was won decisively by the German law. And yet this was not a contest of English with German law. It was a competition

between systems of legal rules, not between modes of judicial administration of justice. In a comparison of abstract systems, the common law is at its worst. In a test of the actual handling of single controversies, it has always prevailed. Nor is this all. The American development of the common-law doctrine of supremacy of law, in our characteristic institution of judicial power over unconstitutional legislation, is commending itself to peoples who have to administer written federal constitutions. In the reports of South American republics we find judicial discussions of constitutional problems, fortified with citation of American authorities. In the South African reports we find a court composed of Dutch judges, trained in the Roman-Dutch law, holding a legislative act invalid and citing *Marbury* v. *Madison*—the foundation of American constitutional law—along with the modern civilians. The Australian bench and bar, notwithstanding a decision of the judicial committee of the Privy Council in England, are insisting upon the authority of Australian courts to pass upon the constitutionality of state statutes; and the Privy Council has found itself obliged to pronounce invalid a confiscatory statute enacted by a Canadian province. Even in Germany, of which we are prone to think as the land of that administrative government which is so alien to the common-law polity, publicists are now pronouncing it a fundamental defect of their public law that constitutional principles are not protected by an independent court of justice. Moreover, if in the eighteenth century, while the absorption of the law merchant was in progress, Anglo-American law received not a little of the civil law indirectly, through the Continental treatises on commercial law which exercised so wide an influence at that time, in the nineteenth century we were well avenged. In the more recent development of the subject, the commercial law evolved in the English courts has played a leading part, and Continental jurists do not hesitate to admit that in this way a considerable measure of English law has been received into European legal systems. When

we add that the most significant movement today in the countries that received the Roman law is a change of front from the Byzantine idea of a closed system of rules, authoritatively laid down, which judges may only apply in a mechanical fashion, in the direction of the common-law idea of judicial law-making through the decision of causes, it must be conceded that our Anglo-American system, no less than its older rival, is a law of the world.

Vitality and tenacity are not new qualities in our legal tradition. It has been able to receive and to absorb the most diverse bodies of doctrine and the most divergent bodies of rules, developed outside of itself, without disturbing its essential unity. Equity, the law as to misdemeanors made in the Star Chamber, the law merchant, admiralty, the law as to probate and divorce made in the ecclesiastical courts, and the statutes of the nineteenth-century legislative reform movement in England and the United States, have been, as it were, digested and assimilated. For, although we are wont to say of some of these that they made over the common law, it is quite as true that the common law made them over. In each case their alien characters have steadily disappeared and today they show few points of difference from the institutions and doctrines of pure common-law pedigree by which they are surrounded.

Moreover, the common law has passed triumphantly through more than one crisis in which it seemed that an alien system might supersede it; it has contended with more than one powerful antagonist and has come forth victor. In the twelfth century it strove for jurisdiction with the Church, the strongest force of that time. In the sixteenth century, when the Roman law was sweeping over Europe and superseding the endemic law on every hand, the common law stood firm. Neither the three R's, as Maitland calls them, Renaissance, Reformation, and Reception (*i. e.*, reception of the Roman law), nor the partial reversion to justice without law under the Tudors shook the hold of our legal tradition. In the seventeenth cen-

tury it contended with the English crown and established its doctrine of the supremacy of law against the Stuart kings. In America, after the Revolution, it prevailed over the prejudice against all things English, which for a time threatened a reception of French law, developed its doctrine of the supremacy of law to its ultimate logical conclusion in the teeth of the strongest political influence of the time, and maintained its doctrine of precedent, involving the unpopular practice of citing English decisions, in spite of the hostility to lawyers and to systematic legal administration of justice characteristic of new communities. It is not too much to say that the common law passed through these several crises with its distinctive fundamental ideas not merely unshaken, but more firmly settled.

Superficially, then, the triumph of the common law and its establishment as a law of the world by the side of the Roman law, seem secure. And yet at the very moment of triumph it is evident that a new crisis is at hand. If not actually upon trial in the United States, the common law is certainly under indictment. If we look only at the three most striking examples of its present world-wide extension,—its doctrine of the supremacy of law, its commercial law, and its law of torts,—its doctrine of supremacy of law and consequent judicial power over unconstitutional legislation is bitterly attacked in the land of its origin, and is endangering the independence and authority of the courts which is the central point of the Anglo-American system; its commercial law is codifying in England and in America; and in its law of torts the sentence of death which hangs over contributory negligence, assumption of risk and the doctrine of liability as a result of fault, so far at least as applied to employees in large industrial enterprises, appears to many of its votaries to involve characteristic principles of the whole system. It is true the world-wide movement for socialization of law, the shifting from the individualist justice of the past century to a newer ideal of justice, as yet none too clearly perceived, is putting a strain upon all law everywhere. In the United

States, however, there is more than this. Here, beyond this strain which is felt wherever law obtains, the rise of executive justice, the tendency to commit everything to boards and commissions which proceed extrajudicially and are expected to be law unto themselves, the breakdown of our polity of individual initiative in the enforcement of law and substitution of administrative inspection and supervision, and the failure of the popular feeling for justice at all events which the common law postulates, appear to threaten a complete change in our attitude toward legal problems.

Nor is our law well-prepared in all respects to meet the present crisis. The conditions of judicial law-making in the United States are by no means those which are demanded for the best development of the common law in an era of growth. The institution of an elective judiciary, holding for short terms, which prevails in so many of our jurisdictions, has not given us courts adequate to such a task. Indeed, the illiberal decisions of which complaint is made today, have been largely—almost wholly—the work of popularly-elected judges. A system of law-making through judicial empiricism calls for much more in a judge than popularity, honest mediocrity or ignorant zeal for the public welfare can insure. In the period of growth in the fore part of the last century there was a strong, independent bench. That American law grew so rapidly and was fashioned so well up to the Civil War and stood still so steadfastly thereafter, was by no means wholly due to causes of general operation that made for rigidity of law throughout the world in the nineteenth century. It is demonstrable that this change was due in large measure to a change in the character of the bench in our state courts, closely connected with the change in the mode of choice and tenure of judges which swept over the country after 1850. Moreover, the condition of pressure under which causes are passed upon in the American urban communities of today, where crowded calendars preclude the thoroughness in presentation and deliberation in judi-

cial study which were possible a century ago, prevent judicial law-making from achieving its best. An example from the law reports will make clear what this means. In 9 Cranch, reporting the decisions of the Supreme Court of the United States from February, 1812, to March, 1813, inclusive, decisions in eighty-four cases are reported. In other words seven judges had eighty-four cases before them in fourteen months. In 230 U. S., reporting the decisions of the same court handed down on the one single day, June 16, 1913, decisions in sixty cases are reported. In other words, a hundred years later nine judges had before them for argument between January 10 and April 9 of 1913 and decided on June 16 of that year three-fourths as many cases as the court a hundred years before was required to pass upon in fourteen months. In substance, nine judges have before them in that court today two hundred and eighty cases where seven judges a century ago were called on to hear eighty-four. This does not mean merely that the judges are compelled to work rapidly and with a minimum of deliberation. In order to hear these cases at all the time allowed to counsel must be greatly abridged. Hence where a century ago counsel were heard until every detail had been gone into thoroughly in oral argument, today the court is compelled to restrict argument to an allowance of an hour and a half to counsel upon each side. In state courts the pressure has become even greater. Thus at a time when constructive work of the highest order is demanded, when questions are raising more difficult than any with which American judges had to deal in our classical constructive period—the period from the Revolution to the Civil War—in many of our states the courts are none too well equipped to do the work effectively, and in all of them the pressure of business is such that work of the highest type is all but precluded.

Perceiving the condition rather than the causes of unsatisfactory judicial administration of justice, men are coming forward with all manner of supposed cures. Perhaps the most popular is to tinker the judicial organization,

carrying still further the tearing down of the Anglo-American judicial office and the subjection of the judge to politics. Another is to supersede the common law by a mass of detailed legislation which aims to leave nothing to the judge. Another goes to the opposite extreme and urges that we abandon all juristic premises and put judicial law-making at large as completely as legislative law-making. The lawyer may not sit by silently when such proposals, flying in the face of all that experience has taught us in the course of legal history, are making head in the community. That they are gaining adherents makes it timely for him to examine the body of legal tradition on which he relies, to ascertain the elements of which it is made up, to learn its spirit, and to perceive how it has come to be what it is, to the end that we may know how and how far we may make use of it in the stage of legal development upon which the world has now entered.

No doubt there are those who will think the lawyer must apologize, or at least must show cause, for all but the last of these inquiries. For it may be conceded that historical jurisprudence, for the moment, is discredited. The fashion of the time calls for a sociological legal history; for a study not merely of how legal doctrines have evolved and developed considered only as jural materials, but of the social causes and social effects of doctrines and of the relations of legal history to social and economic history. I should be the last to deny the great importance of this feature of the program of the sociological jurist. But it is possible to overrate the value of this type of legal history for juristic purposes. Just as a past generation, seeing rightly that there was an intimate connection between law and politics, assumed that the political interpretation of jurisprudence and legal history was the whole story, so another generation, seeing rightly that there is an intimate relation between law and economics, may make the same assumption of all-sufficiency for the economic interpretation of jurisprudence and legal history, and that without much more warrant. For by and large the economic inter-

pretation of legal history has been sustained by examples drawn from legislation which has failed to leave any permanent mark in the law or by a superficial view of particular juristic or judicial doctrines out of their true juridical setting. In truth two powerful forces have counteracted economic pressure and class interest throughout the history of law, and have prevented the law of peoples that have attained any degree of legal development from being what economic forces or class conflict might else have made it. These are, first, the insistence upon development of law logically from analogies of existing rules and doctrines, both because it was supposed the jurist or the judge could not make law but could only find it and because the demand for certainty and predicability, resting on the social interest in security, was held to require him to deduce according to a known technique from premises already existing, and, second, conscious endeavor to make law express supposed eternal and unchangeable ideals.

Conscious, constructive law-making is a late phenomenon in legal history. In primitive society the idea of sacred law or of settled custom, all departure wherefrom is dangerous, in a later stage the authority of fixed ascertainments of the traditional law, and later still the conception of an eternal and immutable natural law, of which the law of the time and place is but declaratory—all these make against conscious and deliberate creation of law by the free setting up of new premises or by the promulgation of rules which cannot be derived or made to appear derived from existing premises. Even in periods of growth, in which ideals are sought avowedly and attempt is made to shape the law thereto, an identification of these ideals with an ideal development of received legal principles is not unlikely to be the outcome. This tendency to rational working out of the jural materials in the traditional system and the demand for certainty lead jurists and judges to resort to analogy whenever they are confronted with a new problem. They fortify what would be, no doubt, a natural tendency so to proceed in any event. Hence the chiefest factor in

determining the course which legal development will take with respect to any new situation or new problem is the analogy or analogies that chance to be at hand when those whose function it is to lay down the law are called upon to make an authoritative determination.

Legal history, then, may be made to show us the analogies, the legal premises, which have developed as the potential bases of legal growth. It may be made to show us the ideals which have developed, to which jurists and judges have sought to make law conform by logical use of these analogies and logical drawing out of these premises. It may be made to show the way in which the working out of these analogies and the logical development of these premises have determined both the content and the spirit of the tradition which is the most important part of our law both in bulk and in intrinsic significance. It may be admitted that this is not all we shall need in order to make effort effective in achieving the purposes of law in a new period of growth. But it is a large part and an essential part. For the inquiry will be nothing less than a taking stock of the materials with which we must work, since, in the long run, the condition of law depends upon the condition of the traditional element in the legal system, by which legislative rules are interpreted and developed and into which, if they succeed in establishing themselves as law, enacted rules are absorbed and incorporated.

If we look narrowly at our legal tradition we shall see that it has two characteristics. On the one hand, it is characterized by an extreme individualism. A foreign observer has said that its distinguishing marks are "unlimited valuation of individual liberty and respect for individual property." It is concerned not with social righteousness but with individual rights. It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe. Its respect for the individual makes procedure, civil and criminal, ultra-contentious, and preserves in the modern world the archaic theory of litigation as a fair fight, according to the canons

of the manly art, with a court to see fair play and prevent interference. Moreover it is so zealous to secure fair play to the individual, that it secures very little fair play to the public. It relies on individual initiative to enforce the law and vindicate the right. It is jealous of all interference with individual freedom of action, physical, mental, or economic. In short, the isolated individual is the center of many of its most significant doctrines. On the other hand, it is characterized by another element tending in quite another direction: a tendency to affix duties and liabilities independently of the will of those bound, to look to relations rather than to legal transactions as the basis of legal consequences, and to impose both liabilities and disabilities upon those standing in certain relation as members of a class rather than upon individuals.

What, then, has determined these characteristics of our legal tradition? How does it come to be so thoroughly, so obstinately individualist in a time that looks more and more to social control for a solution of its problems and its bringing about a socialization of pretty much everything except the common law? How does it come that at the same time this tradition contains another element of an opposite tendency, an element that leads it to deal with men in groups or classes or relations and not as individuals? These questions demand our attention before we assume to pronounce what we may make of our traditional jural materials for the purposes of today and of tomorrow.

Seven factors of the first importance appear to have contributed to shape our American common law. These are: (1) an original substratum of Germanic legal institutions and jural ideas; (2) the feudal law; (3) Puritanism; (4) the contest between the courts and the crown in the seventeenth century; (5) eighteenth-century political ideas; (6) the conditions of pioneer or agricultural communities in America in the first half of the nineteenth century, and (7) the philosophical ideas with respect to justice, law and the state that prevailed in the formative period in which the English common law was made over for us by American

courts. All but one of these made strongly for individualism, and it is to them that we must trace the intense individualism that has made the classical common-law tradition so out of accord with the present. One of them, however, namely, the feudal law, has given to our legal system a fundamental mode of thought, a mode of dealing with legal situations and with legal problems which gives wholly different results, a mode of thought which has always tempered the individualism of our law, and now that the change from a pioneer, agricultural, rural society to a settled, industrial and commercial and even predominantly urban society calls for a new order of legal ideas, has been the chief resource of the courts in the movement which has long been proceeding quietly beneath the surface in judicial decision. Let us remember that the high water mark of individualism in American law was reached in the last quarter of the nineteenth century. Before that signs of a reaction were appearing, and the common-law tradition proved to have in itself a principle which could be employed to carry forward that reaction without any general disturbance of the legal system.

In considering the foregoing factors in order and in appraising the extent to which and the manner in which they have influenced or fashioned the common law, a few words as to the substratum of Germanic law will suffice.

Speaking broadly, it is true that for all but academic purposes the history of English law begins in the thirteenth century. Yet it is equally true that no arbitrary beginning may be assigned to any institution. In law especially, where until modern times conscious making of much that was new was quite unthinkable, nothing is made at once, as it were, out of whole cloth. There were few anywhere who knew any too much of Roman law when the system that grew up in the courts of the Norman kings had its beginnings, and certainly what was known of it in England was superficial enough. The materials with which the first common-law judges wrought were Germanic materials. The ideas from which and with which they laid the foun-

dations of the Anglo-American legal system were ideas of Germanic law. So thoroughly did they lay them, so great was the advantage to the law of strong, central courts of justice administering the king's law for the whole realm as the common law thereof, that our law is today more Germanic than the law of Germany itself. The Norman conquest brought a Romance element into our speech. But it brought relatively little that was Roman into the law. When later the Roman law swept over Continental Europe, the traditional law, local, provincial, and conflicting on the Continent, was general, unified, and harmonious in England. In England, therefore, with a vigorous, central judicial system behind it and an established course of teaching in the Inns of Court which gave it the toughness of a taught tradition, the Germanic law persisted. When in the seventeenth century the labors of Coke gave it the form in which we received it in America, the common law was an English development of Germanic legal ideas. Roman law undoubtedly contributed many analogies and many conceptions which were worked into the system. But they were worked over as well as worked in and acquired the character of endemic law. Accordingly because of the attempt at Germanization of the law of the German empire as a result of the Germanist movement in the nineteenth century and the substitution of Germanic doctrines for Roman here and there in the new civil code, our law has in it less of the Roman than the Romanized law of Germany has of the Germanic.

That the substratum of our law is Germanic is something of much more than academic interest. It means that the basis of American law, the material out of which American judges in the nineteenth century made the law under which we live represents the stage of legal development which may be called the stage of the strict law. On the other hand, the basis of the common law of Continental Europe, the Digest of Justinian, made up of extracts from the writings of the classical Roman jurists, represents the later stage of legal development which may be called the

stage of equity or natural law. Our law also went through that later stage. But in the maturity of our law we still had a double system in which each stage of legal development was represented. In Continental Europe, on the contrary, the materials on which legal development proceeded after the reception of Roman law, had been all but purged of the characteristic features of the stage of the strict law before they were handed down to the modern world. In consequence our judicial tradition, speaking from our classical period, the period in which Coke and his contemporaries summed up and restated the law developed by English courts from the thirteenth to the fifteenth century, in a sense speaks from the stage of the strict law. The continental juristic tradition, speaking from the Byzantine version of the classical Roman jurists, who wrote from the first to the third century and representing, not the strict, archaic *ius ciuile* but the liberal, modern *ius gentium* and *ius naturale,* speaks from the stage of equity or natural law.

Individualism is a prime characteristic of the stage of legal development to which I have referred as the strict law. For example, it insists upon full and exact performance at all events of a duty undertaken in legal form. It makes no allowance for accident and has no mercy for defaulters. When a debtor in the sixteenth century incurred a heavy forfeiture through the sudden rising of a river which he had to pass in order to pay at the time fixed in his bond, the law asked simply whether he undertook to pay at that date and whether he paid accordingly. He took the risk of mischance, and the strict law did not undertake to act as his guardian. Again, the strict law had little use for one who was tricked or coerced into a legal transaction. It might allow him to sue for the wrong done. But it declined to set aside the transaction. If he could not guard his own interests, he must not ask the courts, which were only keeping the peace, to do so for him. When it did regard force and fraud, the law in this stage refused to regard the actual case and ask, Was this man deceived or compelled? Instead it asked, Would the

standard, normal man have been defrauded or coerced by what was done? In other words, it held that every man of mature age must take care of himself. He need not expect to be saved from himself by legal paternalism or by legal maternalism. If he made a foolish bargain, it conceived he must perform his side like a man, for he had but himself to blame. When he acted, he was held to have acted at his own risk with his eyes open, and he must abide the appointed consequences. He must be a good sport and bear his losses smiling. The stock argument of the strict law for the many harsh rules it enforces is that the situation was produced by the party's own folly and he must abide it. The whole point of view is that of primitive society and recalls the story in Tacitus of how the Germans played dice. They played, he tells us, as a serious business, even staking their own liberty; and if one lost in such a case, he voluntarily went into slavery and patiently allowed himself to be sold. Something of this spirit, which is the spirit of the strict law, may be recognized today in such doctrines as contributory negligence and assumption of risk and the exaggerations of contentious procedure which treat litigation as a game.

Thus our Anglo-American law in its very beginning has in it the individualism of the strict law.

While the strict law insisted that every man should stand upon his own feet and should play the game as a man, without squealing, the principal social and legal institution of the time in which the common law was formative, the feudal relation of lord and man, regarded men in quite another way. Here the question was not what a man had undertaken or what he had done, but what he was. The lord had rights against the tenant and the tenant had rights against the lord. The tenant owed duties of service and homage or fealty to the lord, and the lord owed duties of defense and warranty to the tenant. And these rights existed and these duties were owing simply because the one was lord and the other was tenant. The rights and duties belonged to that relation. Whenever the existence

of that relation put one in the class of lord or the class of tenant, the rights and duties existed as a legal consequence. The first solvent of individualism in our law and the chief factor in fashioning its system and many of its characteristic doctrines was the analogy of this feudal relation, suggesting the juristic conception of rights, duties, and liabilities arising, not from express undertaking, the terms of any transaction, voluntary wrong-doing, or culpable action, but simply and solely as incidents of a relation.

How important this conception is in the system of the common law may be perceived if we compare the Roman and the Anglo-American way of putting things with respect to some of the everyday institutions of the law. In the Romanist system the chief rôle is played by the conception of a legal transaction, an act intended to create legal results to which the law carrying out the will of the actor gives the intended effect. The central idea in the developed Roman system is to secure and effectuate the will. All things are deduced from or referred to the will of the actor. Arising as the law of the city of Rome when it was a city of patriarchal households, and as a body of rules for keeping the peace among the heads of these households, its problem was to reconcile the conflicting activities of freemen, supreme within their households but meeting and dealing with their equals without. Accordingly, it held them in penalties for such injuries as they did wilfully, and held them in obligations to such duties or performances as they undertook in legal form. It held them *for* what they willed and did willingly and it held them *to* what they willed and undertook legally. In our law, by contrast, the central idea is rather relation. Thus in agency, the civilian thinks of an act, a manifestation of the will, whereby one person confers a power of representation upon another, and of a legal giving effect to the will of him who confers it. Accordingly he talks of the contract of mandate. The common-law lawyer, on the other hand, thinks of the relation of principal and agent and of powers, rights, duties and liabilities, not as willed by the parties but as incident

to and involved in the relation. He, therefore, speaks of the relation of principal and agent. So in partnership. The Romanist speaks of the contract of *societas*. He develops all his doctrines from the will of the parties who engaged in the legal transaction of forming the partnership, and he treats it, when formed, on the analogy of *communio* or common ownership in case of the *consortium* of co-heirs who keep the patriarchal household undivided after the death of its head. We speak instead of the partnership relation and of the powers and rights and duties which the law attaches to that relation. Again, the Romanist speaks of a letting and hiring of land and of the consequences which are willed by entering into that contract. We speak of the law of landlord and tenant and of the warranties which it implies, the duties it involves and the incidents attached thereto. The Romanist speaks of a *locatio operarum*, a letting of services and of the effects which the parties have willed thereby. We speak of the relation of master and servant and of the duty to furnish safe appliances and the assumption of risk which are imposed upon the respective parties thereto. The Romanist speaks of family law. We speak of the law of domestic relations. The double titles of our digests, such as principal and surety, or vendor and purchaser, where the Romanist would use the one word, suretyship or sale, tell the same story.

The idea of relation and of legal consequences flowing therefrom pervades Anglo-American law on every hand. At law, the original type which provided the analogy still exists in the law of landlord and tenant. If I occupy your land adversely, you may put me out and then have your action on the case for mesne profits; but you have no action against me for that I am enriched unjustly by the use and occupation of your land. The action for use and occupation may only be maintained where a relation exists. But when the relation does exist, a train of legal consequences follow. There is an implied warranty of quiet enjoyment. There is an obligation to pay rent simply

because of the relation, which the covenants in the lease only liquidate. Covenants in the lease run with the land; that is the incidents so created go with the relation, not with the person who made them. Again, in case of a conveyance for life there is still the relation of tenure, involving duties of the tenant toward those in reversion and remainder. Hence covenants are said to run with the land, that is, to follow the relation. But in case of a conveyance in fee simple there has been no relation since the statute of *Quia Emptores* in the reign of Edward I, and so the burden of covenants in the conveyance does not run. In the United States, when we sought to extend the law as to the creation of legal servitudes by permitting such covenants to run, we did not break over the rule expressly, but our courts instead turned to the word "privity," which in its proper use refers to a relation, and thought the result justified by the conjuring up of a fictitious privity. So also in the law of torts, the existence of some special relation calling for care or involving a duty of care is often decisive of liability. For example if A is drowning and B is sitting upon the bank with a rope and a lifebelt at hand, unless there is some relation between A and B other than that they are both human beings, for all that the law prescribes, B may smoke his cigarette and see A drown. In the absence of a relation that calls for action the duty to be the good Samaritan is moral only. Other systems may reach the result in another way. But here and in other places where it is much less legitimate, the common-law judge tends to seek for some relation between the parties, or, as he is likely to put it, some duty of the one to the other.

Again in the case of mortgagor and mortgagee, we do not ask what the parties agreed, but we apply rules, such as once a mortgage always a mortgage, or such as the rule against clogging the equity of redemption, which defeat intent, in order to enforce the incidents which courts of equity hold involved in the relation. In the case of sale of land, it is not our mode of thought to consider that we

are carrying out the will of the parties as manifested in their contract. Once the relation of vendor and purchaser is established, we think rather of the rights and duties involved in that relation, of the conversion of the contract right into an equitable ownership and the turning of the legal title of the vendor into a security for money, not because the parties so intended, but because the law, sometimes in the face of stipulations for a forfeiture, gives those effects to their relation. Then too, we have the great category of fiduciary relations, of which trustee and beneficiary is the type. It is true this category and many of the instances above recounted are the work not of common-law courts but of the courts of equity. But the common-law lawyer was at work in the courts of equity. The clerical chancellors brought about an infusion of morals into the legal system. To prevent dishonest or unconscientious conduct, interposing originally perhaps for the welfare of his soul, they forbade the trustee or the fiduciary doing this or that which legally he was at liberty to do. Presently the lawyers came to sit upon the wool sack. They turned at once to their staple analogy, lord and man, landlord and tenant, and out of the pious interference of the chancellors on general grounds of morals they built the category of fiduciary relations with rights and duties annexed to them and involved in them, no matter what the parties to the relation may intend. So completely has this idea taken possession of equity that more than one subject, for example interpleader and bills of peace, is embarrassed by a struggle to find "privity," a struggle to find some relation to which the right to relief may be annexed.

Our public law, too, is built around this same idea of relation. Magna Charta is recognized as the foundation of Anglo-American public law. But Professor Adams has shown that, as a legal document, Magna Charta is a formulation of the duties involved in the jural relation of the king to his tenants in chief. As the Middle Ages confused sovereignty and property, it was easy enough to

draw an instrument declaring the duties incident to the relation of lord and man which, when the former happened to be king, could be made later to serve as defining the duties owing by the king in the relation of king and subject. Political theory sought to explain the duties of rulers and governments by a Romanist juristic theory of contract, a theory of a contract between sovereign and subjects which was devised originally in the medieval contests between church and state to justify disobedience of the pious subject who resisted a royal contemner of ecclesiastical privileges. We shall see in another connection how in the eighteenth century the two theories merged and the common-law rights of Englishmen, involved in the relation of king and subject, became the natural rights of man deduced from a social compact. Here it suffices to note that the latter is an alien conception in our law. After working no little mischief in our constitutional law in the nineteenth century, this conception of natural rights going back of all constitutions and merely declared thereby is giving way and there are signs that we shall return to the true common-law conception of the rights and duties which the law imposes on or annexes to the relation of ruler and ruled.

Because of its origin in the general application to new problems of the analogy of the reciprocal rights and duties of lord and man, I have ventured to call this element of our legal tradition "feudal law." Perhaps it might be called "Germanic law." For in comparing Roman law and Germanic law, we are struck at once by differences of treatment of the same institution in the two systems, and these differences turn largely upon their respective use of will and of relation as fundamental notions. Compare for instance the Roman *patria potestas*, the power of the head of the household, with the corresponding Germanic institution of the *mundium*. The Roman institution is legally quite one-sided. The *paterfamilias* is legally supreme within the household. He has rights. But whatever duties he may owe are owed without the household,

not within. On the other hand the Germanic institution is conceived of as a relation of protection and subjection. But the subjection is not because of a right of the housefather. It is a subjection because of the relation and for the purposes of the protection which the relation involves. Also the right of the housefather grows out of the relation and is a right against the world to exercise his duty of protection. Indeed, Tacitus indicates to us this idea of relation as a characteristic Germanic institution. As such, it became the fundamental legal idea in the feudal social organization. In our law, however, the idea is a generalization from the results of judicial working out of one problem after another by the analogy of the institution with which courts were most familiar and had most to do in the formative period of English law, namely, the relation of lord and tenant.

In the nineteenth century the feudal contribution to the common law was in disfavor. Puritanism, the attitude of protecting the individual against government and society which the common-law courts had taken in the contest with the crown, the eighteenth-century theory of the natural rights of the abstract individual man, the insistence of the pioneer upon a minimum of interference with his freedom of action, and the nineteenth-century deduction of law from a metaphysical principle of individual liberty—all these combined to make jurists and lawyers think of individuals rather than of groups or relations, and to make jurists think ill of anything that had the look of the archaic institution of *status*. The Romanist idea of contract became the popular juristic idea and, as Maitland puts it, contract became "the greediest of legal categories." Attempt was made to Romanize more than one department of Anglo-American law by taking for the central idea the Roman doctrine of a legal giving effect to the individual will. This was furthered by the general acceptance in England and the United States of the political interpretation of jurisprudence and of legal history, an interpretation which found the key to social

and hence to legal progress in a gradual unfolding of the idea of individual liberty in the progress of political institutions. It was furthered also by the famous generalization of Sir Henry Maine that the evolution of law is a progress from *status* to contract. Accepting this doctrine, English writers have charged that the common law is archaic because it refers legal consequences to relations rather than to contracts or to intention. But in truth the dogma of Sir Henry Maine is a generalization from Roman legal history only. It shows the course of evolution of Roman law. On the other hand it has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it, unless indeed, we are progressing backward. Taking no account of legislative limitations upon freedom of contract, in the purely judicial development of our law we have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth century sought to make them, but are instead, as we say, quasi-contractual; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public. What is this in each case (and these are relatively recent developments of the law), but the common-law idea of relation, a relation of insurer and insured and of public utility and patron, and of rights, duties and liabilities involved therein? It is significant that progress in our law of public service companies has taken the form of abandonment of nineteenth-century views for doctrines which may be found in the Year Books.

Even more significant is the legislative development whereby duties and liabilities are imposed on the employer in the relation of employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it. Such is the settled tendency of the present. To me it seems a return to the common-law conception of the relation of master

and servant, with reciprocal rights and duties and with liabilities imposed in view of the exigencies of the relation. These acts have put jurists to much trouble when they have sought to find a place for them in the legal system. Some have said they create a *status* of being a laborer, and this has frightened more than one court. For status is an archaic idea, quite out of line with modern ideas. Hence they have felt bound to inquire what warrant could be found for imposing disabilities upon one whom nature had given a sound mind, disposing judgment and years of discretion. Others have said that the duties and liabilities involved in workmen's compensation acts were quasi-contractual—which means only that the author did not know what to call them or where to place them. What is clear is that they are not contractual and that they are not in accord with the principles of the law of torts. Is this legislation, then, in opposition to our law of torts, so that one or the other must give way? If so, if this legislation may not be made to fit into the system of the common law, it may go hard with it in the judicial working out of its consequences. But I submit that the common law has a place for it and that it is perfectly possible without disturbance of our legal system, to administer these statutes and to give them the sympathetic judicial development which all statutes require in order to be effective. For it is not out of line with the common law to deal with causes where the relation of master and servant exists differently from causes where there is no such relation. It is not out of line to deal with such causes by determining the duties and the liabilities which shall flow from the relation. On the contrary, the nineteenth century was out of line with the common law when it sought to treat the relation of master and servant in any other way. In administering these acts the common law may employ its oldest and most fertile legal conception. Hence we may believe confidently that it will soon assimilate this legislation and develop it into an agency of justice.

It used to be said by way of reproach that the common

law was feudal. The Roman idea of a legal transaction, which the nineteenth century sought to apply to all possible situations, was regarded as the legal institution of the maturity of law. But the conception of a legal transaction regards individuals only. In the pioneer agricultural societies of nineteenth-century America such a conception sufficed. In the industrial and urban society of today classes and groups and relations must be taken account of no less than individuals. Happily the nineteenth century did not lose for us the contribution of the feudal law to our legal tradition. In its idea of relation, in the characteristic common-law mode of treating legal problems which it derived from the analogy of the incidents of feudal tenure we have a legal institution of capital importance for the law of the future; we have a means of making our received legal tradition a living force for justice in the society of today and of tomorrow, as it was in the society of yesterday.

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